

OPINION
66-205

December 5, 1966 (OPINION)

Mr. R. J. Bloedau

State's Attorney

Hettinger County

RE: Soil Conservation - Tree Planting - Lien

This is in reply to your request for an opinion of this office in regard to soil conservation district's liens for tree-planting.

Your questions are states as:

- 1) May the Soil Conservation District file a 'Mechanic's Lien' for tree-plantings performed for a farmer, and for which he now refuses to pay? (Sec. 35-27-01 (3)).
- 2) Can such lien be perfected or filed more than six years after the tree-planting was accomplished?"

We note that among the powers and duties of soil conservation districts enumerated in section 4-22-26 (15) (10) of the North Dakota Century Code are:

" * * *

15. As a condition to the extending of any benefits under this chapter to, or the performance of work upon, any lands not owned or controlled by this state or any of its agencies, to require contributions in money, services, materials, or otherwise to any operations conferring such benefits, and to require land occupiers to enter into and perform such agreements or covenants as to the permanent use of such lands as will tend to prevent or control erosion thereon.

10. To sue and be sued in the name of the district;

* * *."

Section 35-27-02 of the 1965 Supplement to the North Dakota Century Code provides:

WHO ENTITLED TO MECHANIC'S LIEN. Any person who improves real estate by the contribution of labor, skill or materials, whether, under contract with the owner of such real estate, or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated or to which it may be removed, for the price or value of such contribution."

Section 35-27-01 of the North Dakota Century Code, as amended,

defines the word "person" as used in said chapter as follows:

'Person' means every natural person, fiduciary, association or corporation."

Section 4-22-13 of the North Dakota Century Code provides insofar as here applicable that:

Upon the certification by the committee to the secretary of state as provided in section 4-22-12, the district shall become a governmental subdivision of the state and a body corporate and politic. * * *."

On such basis it would appear that soil conservation districts are bodies corporate, as such, entitled to enter into the type of contracts contemplated, and to enforce them by the means designated by chapter 35-27 of the 1965 Supplement to the North Dakota Century Code. We agree with your thought that the type of project to which you make reference is one to "improve", as defined in subsection 3 of section 35-27-01 of the 1965 Supplement to the North Dakota Century Code, real estate and therefore enforceable by the lien specified in said chapter 35-27 of the 1965 Supplement to the North Dakota Century Code.

In reply to your second question we note that section 35-27-25 of the North Dakota Century Code, as amended, provides insofar as here applicable:

REQUIRING SUIT TO BE COMMENCED - DEMAND - LIMITATIONS OF ACTION. * * * No lien shall be valid or effective as such, nor shall the same be enforced in any case, and the clerk of the district court shall cancel any such lien of record, unless the holder thereof shall assert the same either by complaint or answer within six years after the date of the last item of his claim as set forth in the recorded lien account, or within six years after it becomes due, if the lien account shows that it is not then due. If a summons and complaint or answer asserting the validity of the lien is not filed in the office of the clerk of court in which the lien is filed within the limitation herein provided, the clerk of court, upon request of any interested person, shall cancel the lien of record."

With regard to the application of such limitation statutes to mechanics' liens generally we note the following in 36 Am. Jur. 153, 154, Mechanics' Liens, as supplemented to date:

Section 241. GENERALLY. An action to enforce a mechanic's lien, like all other actions, must be brought within the time prescribed by statute. Whether the right to the lien is lost by failure to commence the action within the time prescribed by statute depends upon whether the particular statutory provision is a statute of limitations or a statute limiting the duration of the lien. The courts of most jurisdictions treat such statutes as statutes limiting the duration of the lien. If the time which the lien statute allows for suit is to be regarded as defining the duration of the lien, and suit is not brought within that time, the line expires irrespective of alleged

agreements or waivers to the contrary. Consequently, it is generally held that the failure to enforce the lien within the time prescribed by statute is not waived by failure to raise such objection by demurrer or answer. And since ordinarily the time prescribed by such statutes for bringing suit constitutes a limitation of the right and not merely of the remedy, there is usually no sufficient ground for applying the saving clause of a general limitation statute to suits not commenced within the prescribed time.

Whether a statutory provision suspending the running of the statute of limitations during the absence of a debtor from the state applies to a proceeding to enforce a mechanic's lien is in the first instance a question of construction of the local statutes. Where the proceeding is one in rem, the nonresidence of a purchaser or encumbrancer after the lien has attached will not toll the statute of limitations applicable to the foreclosure of the lien; but where by reason of the nonresidence of the principal debtor the action is not barred as to such debtor, it is not barred as to other persons holding liens upon the premises."

We do not find judicial precedent of this state with regard to the application of the above quoted section 35-27-25. We do, however, note that *Sleeper v. Elliot*, 36 N.D. 280, 162 N.W. 305, is cited in the footnotes to the very similar section 35-12-22 of the North Dakota Century Code as being for the proposition that:

Part payment of a note or claim secured revives the security as well as the debt, and extension of time for payment of the debt extends the time for the enforcement of the lien also."

In specific reply to your second question, on the basis of the above, and the facts you have presented, we would agree with your conclusion in what we understand to be the usual type of situation, however, in particular cases there might be circumstances that could give a different result. Section 35-27-25 does refer to "the date of the last item of his claim * * * or * * * after it becomes due," rather than specifically to the time "the tree-planting was accomplished."

HELGI JOHANNESON

Attorney General